United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

San Pedro, Los Angeles & Salt Lake Railroad Company, a corporation, *Plaintiff in Error,* vs. United States of America, *Defendant in Error.*	No. 2412.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

Comes now San Pedro, Los Angeles & Salt Lake Railroad Company, plaintiff in error, and respectfully moves this Honorable Court to grant a rehearing herein, on the grounds, and for the reasons, as follows, to-wit:

I.

The court erred in affirming the judgment rendered below on counts 3, 4, 5, 6, 7 and 8, of case No. 243.

II.

The court erred in not reversing the judgment below upon counts 3, 4, 5, 6, 7 and 8, of case No. 243.

III.

The court erred in holding that subdivision "(i)" of rule No. 287 of the Interstate Commerce Commission, made March 16th, 1908, modified ruling No. 88 of the same body, made June 25th, 1908.

IV.

The court misinterpreted subdivision "(i)" of said ruling No. 287.

V.

Ruling (i) No. 287, and ruling No. 88, of the Interstate Commerce Commission, being necessarily inconsistent, the court erred in not giving effect to ruling No. 88, which was later in point of time.

VI.

The court erred in not accepting and applying ruling No. 88 as one of contemporaneous construction placed upon the act by the body charged with its enforcement.

VII.

The court erred in not holding ruling No. 88 a rule of property and conduct, and in not sustaining it.

VIII.

The court erred in substituting its own construction for that of the Interstate Commerce Commission reflected by ruling No. 88, in respect to an enactment demanding construction.

IX.

The court misapprehended the scope and meaning of ruling (i) No. 287, and hence misinterpreted said ruling.

X.

The court erred in holding that "from the evidence

it cannot be doubted that the train crew of train No. 1 could have been relieved both at San Bernardino and at Daggett" or at any other place.

XI.

The court erred in holding that the plaintiff in error was required to relieve the train crew of train No. 1, either at Daggett or San Bernardino, or any other point short of Los Angeles, the end of the run.

XII.

The construction given by the court to the first proviso of the third section of the act is erroneous, and in any case it is in conflict with the declared construction thereof by the Interstate Commerce Commission, as manifested by said ruling No. 88.

May It Please Your Honors:

In view of the fact that we were generously and patiently heard upon the submission of the case to Your Honors, and in view of the fact that Your Honors squarely met and decided every point presented for decision, we confess to some embarrassment in making this application, and are only constrained to make it because we feel strongly, with all due respect to Your Honors, that the decision of the court upon the questions hereinabove specified tends to work a nullification of the proviso mentioned, and thereby to deprive the plaintiff in error of the benefit thereof, and, accordingly, we feel that we will not have performed our full duty to our client, and as officers of the court, until and unless we shall have asked this Honorable Court to re-examine and reconsider its decision.

There is a moral side to this case which should not fail of appeal to Your Honors, and that is, that if the act was violated in the respects alleged in the counts *supra,* it was unwittingly violated by the plaintiff in error relying upon the contemporaneous construction placed upon the act by the Interstate Commerce Commission, and conforming its conduct and practices thereto. It is all very well to say that everybody is supposed to know the law.

"The fact that intelligent and fair minds have been in doubt, and have differed on the subject, and an examination of the section itself, both concur to show that, at most, the construction claimed by the government, though it be possible, is doubtful.

"In construing a severe statute declaring a heavy forfeiture (and, according to one construction, claimed for small offenses), it is just to say that those who are called upon to conduct their business affairs in view of all its provisions, ought to be fairly apprised of its requirements, and of its penalties, of whatever kind.

"They are bound to know the law, but lawmakers owe to them the duty to make the law intelligible; and those whose business it is to construe or expound a law which is of doubtful or double meaning should not incline to the harshest possible meaning, when it is obvious that *those* to whom it is to be *applied* may well have been led to trust in another which is less severe, but equally satisfying its terms. This is not saying that laws of the kind in question are to be strictly construed in favor of the subject and against

the state, but only, that they should be construed with reasonable fairness to the citizen."

27 Fed. Cas., 332; Case No. 15,960.

That construction, until it was modified, became an integral part of the law as much as though it had been written in it, and now to declare that construction faulty in reference to an act committed while the construction remained in effect, is to brand the plaintiff in error as a lawbreaker, and incidentally to deprive it of its property.

Here is an act, upon the true construction and meaning of which intelligent minds may well and do differ, and which received construction by the body charged with its execution. What better resolution could it have made? And is the plaintiff in error to be penalized in conforming thereto? The very thought is abhorrent to one's sense of justice, and it is for yielding obedience to the law, as thus construed, the plaintiff in error will, if the judgment in this case shall stand, be deprived of its property. Is it possible that, if our views are sound, the judgment herein can stand?

ARGUMENT.

POINT 1.

THE TWO RULINGS MADE BY THE INTERSTATE COMMERCE COMMISSION.

Rule No. 287 (hereinafter referred to as rule A) was formulated on March 16th, 1908.

Subdivision (i) of section 3 of this rule reads:

"The instances in which the act will not apply in-

clude only such occurrences as could not be guarded against; those which involved no neglect or lack of precaution on the part of the carrier, its agents, or officers; and they serve to waive the application of the law to employees on trains only until such employees, so delayed, reach a terminal or relay point."

Rule No. 88 (hereinafter referred to as rule B) was formulated on June 25th, 1908, and reads:

"The provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen."

"Any employee so delayed may therefore continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip."

Before passing to a consideration of the two rulings, it may not be amiss at this juncture to state that the act was approved March 4th, 1907, and that by section 5 thereof it took effect one year after its passage, or on March 4th, 1908. It thus appears that rule A was formulated substantially contemporaneous with the going into effect of the act (12 days after), and that rule B was formulated June 25th, 1908, or substantially three months after rule A was formulated.

It must not be forgotten that rules A and B are denominated in the evidence "Conference Rulings on the Hours of Service Law by the Commission," implying,

as we think, a conference between the Commission and representatives of the carriers affected by the act, and hence, that the rulings were those in respect to direct inquiries put by the carriers; but it is enough for our purposes that the rulings were made.

Undoubtedly, as Your Honors stated, the purpose of Congress in postponing the effective date of the act one year after its approval was to give the carriers ample time to conform their practices to these requirements.

Analysis of the Rules.

What can be plainer than what the Commission attempted by these rules was to define the meaning of the causes specified in the proviso which, when they, or any of them, existed, removed its application, as those (1) which could not be guarded against; and (2) those which involved no neglect or lack of precaution upon the part of the carrier, its agents or officers?

Strictly, it added nothing to the sum or meaning of the act, or its terms, except, perhaps, to serve to restrict the meaning of the term "casualty." It added nothing to, nor took anything from, the terms respectively "unavoidable accident" or "act of God"—those terms, well understood in law, required no exposition or elucidation; nor did they add to or take from the words "nor where the delay," etc. Exposition was superfluous there. Therefore, the only change made by the rulings was, if you please, to constructively interpolate the word "unavoidable" before, and to qualify the word "casualty," and thus, in effect, put it in the

category of unavoidable accidents, but really to eliminate it altogether. Simmered down, it is as though the rule announced that the term "casualty" as found in the proviso, is defined to be an "unavoidable casualty," and stopped there, and, *presto* (when any such occurrence existed), they served TO WAIVE THE APPLICATION TO EMPLOYEES ONLY UNTIL SUCH EMPLOYEE SO DELAYED REACHED A TERMINAL OR RELAY POINT.

Here, then, is an attempt to fix the time or place at which the act, previously justifiably suspended, shall be restored to its vigor, and such time or place a terminal or relay point. Unfortunately neither the word "terminal," nor the term "relay point" are defined. "Terminal" means and implies *termination* in railroad parlance—*"end of the run."* No difficulty exists with the term "relay point," which is a place of rest or relief; in railroad parlance, a point established for the relief of train or engine crews, or both. The presumption will be indulged that the Commission were speaking in terms of railroads, and, thus understood, the implied command was that the employee delayed in excess of sixteen hours continuously, must be relieved at the first "relay" point established by the carrier in the usual course for relieving crews of the class delayed. The Commission knew that the carriers had, in order to conform to the act, established exclusive relay points for engine crews, freight crews, passenger crews, and for local as well as through passenger crews respectively, and nothing in the rule indicated that the Commission intended or desired to disturb those arrangements.

Rule B of this ruling is so clear and obvious that it needs no construction. After quoting the proviso, the rule announced:

"ANY EMPLOYEE SO DELAYED MAY THEREAFTER CONTINUE ON DUTY TO THE TERMINAL OR END OF THE RUN." and further: "THE PROVISO QUOTED REMOVES THE APPLICATION OF THE LAW TO THAT TRIP."

No ambiguity exists here. The words are plain, simple, direct and expressive, and leave us in no doubt as to their meaning. Here the terminal is fixed as *the end of that run.* "Run" and "trip" are used interchangeably, both words serving to accentuate the meaning; and this, mark you, the Commission, the body specifically charged with the enforcement of the act, proceeds to declare its judgment is that the proviso quoted removes the application of the law to that trip.

Granting that the two rules are in *pari materia,* they are, under well settled principles of construction, to be construed together, and effect given to each if possible. If, however, they are conflicting and inconsistent, then, to the extent of the inconsistency, the later declaration must prevail.

Tested by this rule, what is the result? If it be insisted that the necessary effect of rule A is to require the carrier to relieve the crew at any point short of the *end of the run,* certainly a reasonable construction, then, to that extent, it is in hopeless antagonism to, and irreconcileable with, rule B. The twain cannot stand—the one must go, and that one rule A; otherwise, in all other particulars, both declarations may stand together. It does not need any argument to

demonstrate the correctness of this conclusion—it is self-evident.

Just how Your Honors regarded this situation is not clearly disclosed. All that the opinion states is, "that ruling (rule B) must be read and considered with the preceding ruling of the Commission of March 16, 1908" (rule A); also, "and must also be read and considered in connection with the action of the Commission shown by the record in this case, that the suit was directed to be brought by the attorney general at the request of the Interstate Commerce Commission."

We agree with Your Honors that the two rules must be read and considered together, and thus agreed, we ask in all candor, what is the logical effect if it is not that already stated?

As to the other phase of the matter suggested by the opinion, which refers to the bringing of the action by direction of the attorney general at the suggestion or request of the Interstate Commerce Commission. We do not understand whether Your Honors assigned any importance to the language which is set forth in the complaint—"this action being brought upon the suggestion of the attorney general of the United States at the request of the Interstate Commerce Commission, and upon information furnished by the Commission."

The language used, as we view it, means no more than that the action is brought at the request of the Commission upon information furnished by it, with the consent of the attorney general. It surely does not import that the attorney general, as the result of an independent examination and study of the act, has disapproved rule B. Rather does it mean that the action

was begun and is being maintained by the direct request of the Commission, and that the Commission is sponsor for it.

Therefore, yielding to the court's suggestion that this also must be read and considered in connection with rules A and B, we proceed briefly to do so; and so doing, we find that the Commission has flopped, and by inference broken away from its own rule—the rule of reason. The Commission had heaven's license to err, and afterwards to correct the error, but we humbly submit, it should have renounced its error, if error it was, in the same formal fashion that it fashioned it, and in that way and in that manner afford the carriers of the country an opportunity to offend wittingly.

The first and only notice that the Commission gave to the plaintiff in error, or other carriers, that it had renounced its *rule of reason,* was the commencement of the action. No gentle, nor any, admonition that we were offending the law was ever previously lodged with us. Ours was a security no less certain than the deceptive quicksands of the Platte River. Because we accepted the rule of the Commission and shaped our course and conduct with reference to it, and in reliance upon it, shall we be compelled to suffer in our good name and be deprived of our property also? What we did was not, at the time we did it, under the rule, an offense, but only became such after it was done.

Under rule No. 88, our defense was complete. Under the rule of recession, never promulgated, we were without defense.

The Commission never assailed seriously the sufficiency of our defense as excusing the delay; indeed, it practically admitted it. Its latest theory was that we should have relieved the train crew at the earliest possible moment, to-wit: at either Daggett or San Bernardino, and because we failed to do that, we were guilty of negligence, which made us liable under the law.

We shall not go further over that ground again here, which, on the facts, has been resolved against us, and, as we think, incorrectly, except to say that unless we were required to send relief crews from Los Angeles to either Daggett or San Bernardino, it was impossible for us to have provided relief, and, therefore, as matter of fact, we were not guilty of any want of care; in any event, it is our firm belief that that question should have been submitted to a jury.

POINT II.

But, Your Honors say, "But over and above that, it is the obvious duty of the court to give effect to what it conceives to be the true construction of the act of Congress."

This expression of the court, therefore, makes it essential that we respectfully present a line of cases which will appeal strongly, and, we trust, successfully, in behalf of the proposition that under the circumstances of this case the court should give its support to our contention, that the construction of the Interstate Commerce Commission, known as rule 88, should be fully sustained by Your Honors, rather than annulled.

"Contemporaneous Construction. Primarily it is the function and duty of the courts to interpret the meaning of a statute, and where they can ascertain the legislative intent by the use of intrinsic aids alone, resort to its contemporaneous construction by other persons is both unnecessary and improper. But where the language of the statute itself is ambiguous or uncertain, the opinions entertained by contemporaries as to its meaning are frequently the best guides to the legislative intent."

"Executive Construction. The construction placed upon a statute by the officers whose duty it is to execute it is entitled to great consideration, especially if such construction has been made by the highest officers in the executive department of the government, or has been observed and acted upon for many years, and such construction should not be disregarded or overturned unless it is clearly erroneous.

"The consideration to be accorded executive construction is also especially weighty in the case of statutes prescribing penalties, or levying impositions, where the executive construction has been in favor of the persons affected; or, in cases where the executive construction has been impliedly indorsed by the legislature.

"To the extent that a reversal of the executive construction would result in depriving persons affected of vested rights in property, or contract, the executive construction will be regarded *as conclusive.*"

36 Cyc., 1139-40-41. Citing many cases.

And in Pennoyer v. McConnaughy, 140 U. S. 1-25, 35 Law. Ed. 363, the same principle is thus laid down, on page 370 of the latter:

"The principle that the contemporaneous construction of a statute by the executive officers of the government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts, is so firmly imbedded in our jurisprudence that no authorities need be cited to support it. On the faith of a construction thus adopted, rights of property grow up which ought not to be ruthlessly swept aside, unless some great public measure, benefit, or right is involved, or unless the construction itself is manifestly incorrect."

In U. S. v. Moore, 95 U. S. 760, 24 Law. Ed. 588, decided 1878, the court say:

"The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. (Citing Edwards v. Darby, 12 Wheat. 210; U. S. v. Bk., 6 Pet. 29; U. S. v. McDaniel, 7 Pet. 1.)

"The officers concerned are usually able men, and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret."

And to the same effect is Brown v. U. S., 113 U. S. 568-574, 28 Law. Ed. 1080, as follows:

"It must be conceded that were the question a new one, the true construction of the section would be open

to doubt. But the findings of the Court of Claims show that soon after the passage of the act the president and the navy department construed the section to include warrant as well as commissioned officers, and that they have since that time uniformly adhered to that construction, and that under its provisions large numbers of warrant officers have been retired. This contemporaneous and uniform interpretation is entitled to weight in the construction of the law, and in a case of doubt ought to turn the scale. In Edwards v. Darby, 12 Wheat. 206, it was said by this court that 'In the construction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to act under the law, and were appointed to *carry its provisions into effect,* is entitled to great respect.' This case is cited upon this point with approval in Atkins v. Disintegrating Co., 18 Wall. 301, 21 Law. Ed. 844; Smythe v. Fiske, 23 Wall. 382, 23 Law. Ed. 49; U. S. v. Pugh, 99 U. S. 265, 25 Law. Ed. 322, and in U. S. v. Moore, 95 U. S. 763, 24 Law. Ed. 589. In the case last mentioned the court said that 'The construction given to a statute by those charged with the duty of executing it ought not to be overruled without cogent reasons. The officers concerned are usually able men and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called up to interpret.' And in the case of U. S. v. Pugh, the court said: 'While, therefore, the question, "the construction of the Abandoned Property Act," is one by no means free from doubt, we are not inclined to interfere at this late

day with a rule which has been acted upon by the Court of Claims and the executive for so long a time.' (Citing cases.)

"These authorities justify us in adhering to the construction of the law adopted by the executive department of the government, and are conclusive against the contention of appellant that section 23 did not apply to warrant officers."

The precise question in controversy here was judicially determined and decided for the first time in the case at bar. While the "Hours of Service Act" had been before the courts in one or more phases, in no case was the identical question involved here in case No. 243 ever presented for decision. The nearest approach to it was by the Eighth Circuit in U. S. v. Kansas City Southern Ry. Co., 202 Fed. 828. But while the same proviso was discussed in that case, it was not invoked by the defendant there because of any delay caused by storm and landslide. No such condition figured in that case, while it is the sole and only condition in the case at bar.

In the former case the carrier sought to excuse itself under that part of the proviso of the statute which excuses the carrier "where the delay is the result of a cause not known * * * at the time said employee left a terminal, and which could not have been foreseen." But the cause or causes there presented as defenses were substantially three, to-wit: (1) the steaming qualities of the engine coal; (2) the leaky flues of the engine, and (3) the defective shaker rod for cleaning the engine grates.

It will be seen at a glance that these defenses are purely economical. They relate only to maintenance, equipment, and service conditions; and to keep up the necessary standard in that behalf the carrier is always held to a high degree of care and diligence. And the appellate court held in that case that the carrier under its defenses had fallen short of the essential proof that it "had taken sufficient precaution to see that its engine was in proper condition when it started, and whether the delays which occurred were the result of causes which could not have been foreseen by the exercise of the necessary diligence and foresight."

That case, therefore, throws little or no light upon the question presented here.

The question presented here involves nothing of railroad economics, of defective engines, bad coal, impaired appliances, trains, or cars. Concerning all these things diligence and foresight are cardinal duties of the carrier. But "diligence and foresight" do not enter into the question at bar. That question is purely one of physical fact and visible result. That question is, was the delay the result of a landslide not known, and which could not have been foreseen when the employees left Las Vegas, the initial terminal. The proof is all one way that neither the storm nor the landslide were known or could have been foreseen, because they both happened after the employees left the said terminal.

Neither the storm nor the landslide could have been anticipated or avoided by the exercise of due diligence

and foresight, or, indeed, by even the highest degree of such human qualities.

Nor does the later case of U. S. v. Mo. Pac. Ry. Co., 213 Fed. 169, throw any light upon the case at bar The question there was whether telegraph operators, train dispatchers and employees of their class were included within, or excepted from, that part of the proviso in section 3 of the act reading "that the provisions of this act shall not apply in any case of casualty, or unavoidable accident, or the act of God." The latter part of the proviso, which reads, "nor where the delay was the result of a cause not known to the carrier," etc., was not considered at all, as there was nothing in the case to make it applicable.

So, then, if Your Honors please, up to the decision in the case at bar, we have this condition of things: The Hours of Service Act was approved and became a law March 4, 1907. It did not, however, go into effect until one year thereafter, or March 4, 1908.

Section 4 of the act reads as follows:

"Sec. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this act, and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this act."

Acting under the authority of said section 4, the Commission did, within about three months after the law became effective, ordain and establish, for the information and benefit of all corporations and persons affected by the act, the following interpretation,

rule, or construction of the latter part of the proviso above quoted, to-wit:

"Any employee so delayed may, therefore, continue on duty to the terminal or *end of that run.* The proviso quoted removes the application of the law to that trip."

Now, if Your Honors please, the above construction of that part of the proviso by the body possessed of full executive functions over that act, became and remained virtually the law of the land, and stood as a guide and a protection to all persons and corporations within the provisions of that act. And it was felt and believed to be a haven and a refuge to the defendant company at any and all times since it was pronounced, and was at all times so acted upon by the company.

Such construction of that part of the proviso was substantially contemporaneous with the law's going into effect. And it is a construction acted under for over six years. It has never been changed, altered or modified, either by the Commission or by Congress, and, except to the extent that it may be annulled by the decision of Your Honors in the case at bar, it is still the executive construction of that part of the "Hours of Service Act." It is the last word of the Commission upon that subject, and if there be anything repugnant or contradictory in any antecedent rule or opinion of the Commission, then, under analogy to the construction of statutes, this latest expression should prevail.

"As between conflicting statutes the latest in date will prevail, so between conflicting sections of the

same statute the last in the order of arrangement will control."

11 Fed. Cas. 224, citing Bac. Abr., Stat. D; Dwarris, 156, note; Brown v. Co. Com., 21 Pa. St. 37; Smith v. Moore, 26 Ill. 392.

If this executive construction can be sustained the defendant company should be discharged. Because it is only then necessary to determine what the words "that trip" and "the end of that run" mean, as used by the Commission. On this point there would seem no ground for debate.

Los Vegas and Los Angeles were the termini of "that trip," the former the initial and the latter the ending terminus. "That run" began at Las Vegas and "the end of that run" was Los Angeles; the same being a passenger division of the road and measured and apportioned to meet the requirements of the "Hours of Service Act."

"Where the proper interpretation to be given a statute is a matter of doubt, the practical construction which it has received from those charged with its execution will prevail."

In re Board of Street Opening and Improvement, 12 Misc. Rep. 526, 33 N. Y. Supp. 594;

In re 136th St., *id.;*

U. S. v. Bellm, 182 Fed. 165, citing U. S. v. Ala. R. R. Co., 142 U. S. 616, 35 Law. Ed. 1134.

In the latter case, at page 1136, the court say:

"We think the contemporaneous construction thus given by the executive department of the government and continued for nine years through six different administrations of that department; a construction which, though inconsistent with the literalism of the act, certainly consorts with the equities of the case,—should be considered as decisive in this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced. It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive, and to require from him the repayment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the government. These principles were announced as early as 1827 in Edwards v. Darby, 25 U. S., 12 Wheat. 206-210, and have been steadily adhered to in subsequent decisions. U. S. v. State Bank North Carolina, 31 U. S., 6 Pet. 29, 39; U. S. v. Macdaniel, 32 U. S., 7 Pet. 1; Brown v. U. S., 113 U. S. 568; U. S. v. Moore, 95 U. S. 760, 765." (See also Baker v. Swigart, 199 Fed. 867.)

In this last case this court, speaking through His Honor Judge Ross, said:

"The first thing to do in such a case is to see just what the lawmaking power has enacted. If the provisions of the statute are plain and unambiguous, the courts must accept the law as there declared; otherwise they would usurp the function of the legislative department of the government. Of course, if the provisions of the statute in question be uncertain, conflicting, or ambiguous, they become the proper subject for construction, which is a function of the court, in which event and in aid thereof resort may be had to any construction put upon it * * * by that department of the government charged with the execution of the law."

"Where there is such an ambiguity in a penal statute as to leave reasonable doubt of its meaning, it is the duty of a court not to inflict the penalty."

The Enterprise, 8 Fed. Cas. 732, Case No. 4499.

In U. S. v. Cerecedo etc., 209 U. S. 337-339, 52 Law. Ed. 821, the court say:

"We have said that, when the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the department charged with its execution. Robertson v. Downing, 127 U. S. 607, 32 Law. Ed. 269; U. S. v. Healey, 160 U. S. 136, 40 Law. Ed. 369. Judgment reversed."

Mr. Justice White and Mr. Justice Peckham concur solely because of the prior or administrative construction.

See also

U. S. v. Burkett, 150 Fed. 212.

The words "terminal," "terminal point," "relay point," "trip," and "run" or "the end of the run," are pretty generally understood in railroad circles, and are of very common use. It is, perhaps, for that reason that judicial definitions of them cannot be found.

In 38 Cyc., p. 1995, it is said:

"'Trip,' in its ordinary signification, is a journey, jaunt or excursion by some person. In relation to transportation it is the performance of service one way over a route."

And in note 23, same page, it is said:

"It ordinarily conveys the idea of transportation in one direction. Unless connected with some other expression it does not carry the idea of a return. A 'continuous trip' does not add to the import." (Citing Kelly v. N. Y. City R. Co., 197 N. Y. 97-102, 103, 84 N. E. 569.)

And in 38 Cyc. 187 "terminal" is defined as "forming the terminus or extremity"; and in footnote 41, same page, it is said:

"'Terminal facilities,' as understood by those operating railroads, do not include tracks other than those used in making up trains. 'Terminal point,' in reference to an interstate shipment, is the place of consignment, or the point at which the carriage of one common carrier ends and that of another begins." (Citing 47 Fed. 406.)

POINT III.

The Proviso.

The opinion concedes that plaintiff in error was entirely justified in continuing its train crew up to the time it could, with the exercise of proper diligence, have relieved it; that it had an opportunity to relieve the crew at Daggett or San Bernardino, or both, and was required by the act, properly construed, to avail itself of that opportunity.

Earnestly insisting that the evidence does not, in our opinion, disclose an opportunity to plaintiff in error to provide relief to the crew of train No. 1, or train No. 7, and that the evidence fails utterly to show an opportunity to relieve the crews of either train, and that on the facts the cause should have been remanded for retrial of that question, we proceed to examine the construction placed upon the act by Your Honors in this case.

It is to be observed at the outset that the court's construction of the act destroys rule B, and breathes new life into rule A, although the latter is only an effect.

The opinion concedes an occurrence which, by the express terms of the proviso, made the act inapplicable to the crews of Nos. 1 and 7—that is, concedes the existence of a cause which, when it existed, made the statute inapplicable.

It will, we think, be also conceded that the act itself had no application to either crew until the expiration of the sixteen-hour period—the hour which set it in

operation. After the expiration of that period no cause could arrest the operation of the statute; and, necessarily, the only cause which could defer its application would be one occurring before the act pressed down upon the parties to be governed by it. Such a happening may occur at any time within the sixteen-hour period; the first minute of the first hour, or the last minute of the last hour, but not afterwards; and when it occurs and is productive of delay, it is protected by the proviso. It is not the happening itself but the delay which it occasions which makes the statute inapplicable. This seems to be made clear by the words, "nor where the delay," etc., and, unquestionably, the design of the framers of the proviso was to make the act inapplicable to excess hours resulting from any of the causes specified—causes beyond the power of the carrier to prevent. Logically, therefore, in every such case of excess hours the act never applied. It is as though the statute were non-existent. It is not a case of suspension of the operation of the act but a case in which there is no act to suspend.

The opinion concedes that at the time the crew reached Dagget the act had not been infringed, although at that time the crew had been on duty for a continuous period of more than sixteen hours. In other words, up to that time the train and its crew were not subject to the act. If this be true, the act would not again be operative or applicable until the expiration of the sixteen-hour period after leaving that point, and that period was never reached, the crew having been relieved long before that time was reached.

Is not this the true construction of the act? If yes, none of the counts involved stated a cause of action, and the judgment should be reversed.

The language of the proviso contains no words fixing any period during which the act shall not apply, and if it was the intention of the law makers that the act should be suspended only until the effect of the cause were off and ceased to exist, they certainly failed to express it. What they did was to state "this act shall not apply * * *." Is there any need here for construction?

The necessary effect of the construction of Your Honors is to inject into the proviso words not found there, substantially as follows: "The provisions of this act shall not apply * * * but every employee detained by reason thereof shall be relieved at the first terminal or relay point." Such improvisation is necessary to sustain the construction, to sustain the findings and judgment in this case.

But the proviso under consideration performs a more important function than that performed by the ordinary proviso, which is to state an exception; this proviso prescribes a condition which operates to place certain matters entirely outside of the reach of the statute.

Conclusion.

That the position of counsel be not misapprehended or misunderstood, we are not before Your Honors to contend for a moment that the judicial power does not extend to a sweeping obliteration of any contempor-

aneous or executive construction of a statute or any part thereof.

And the fact that such construction may have received the sanction of ages would not of itself defeat or lessen the judicial dominion of courts over the interpretation and construction of laws.

That is a function, a prerogative, a power so inherent that to question it would evince a type of professional ignorance which, in our opinion, does not exist.

It is this very power which in time of stress not only gives protection to the citizen and subject, but stability to the state.

"Know the law and obey it," is the command of the higher civilization. And it is right that it should be so.

Equality before the law not only makes the nation strong, but the citizenship virtuous and just. No man can justly complain if the law be justly administered.

If Your Honors' decision in the case here were made upon an open statute, expounded for the first time, we see nothing at all in it that could not be regarded as persuasive of a proper judicial interpretation of the act. The supplication we make is not against the power and the duty of the court to construe the act in the light of wisdom and according to conscience. This must be conceded to the court regardless of other interpretations and other views.

What we do, with most respectful deference, beg of Your Honors, is that you measure our condition by the situation meted out to us by the Commission.

Whether the Commission's construction of the proviso in question was in accord with the literalism

thereof is not so much the question with us as is the fact that such views were contemporaneously pronounced by a body of experienced and learned men to whom was committed the power to execute the law. If the advice and the opinions of such men were not intended to be of the primest significance and importance to all those subject to the operation of the law, then the Congress made a mistake in committing to them an authority so comprehensive and so vast.

We must conclude, however, that in the exercise of their authority the Commission has so aptly and so appropriately met the wishes and the views of Congress that no one of its rulings, though numerous and broadcast, and in existence for years as executive beacons illumining the act, has ever received the dissent of Congress, or been the subject of critical debate.

Respectfully submitted,

A. S. Halsted,

J. E. Kelby,

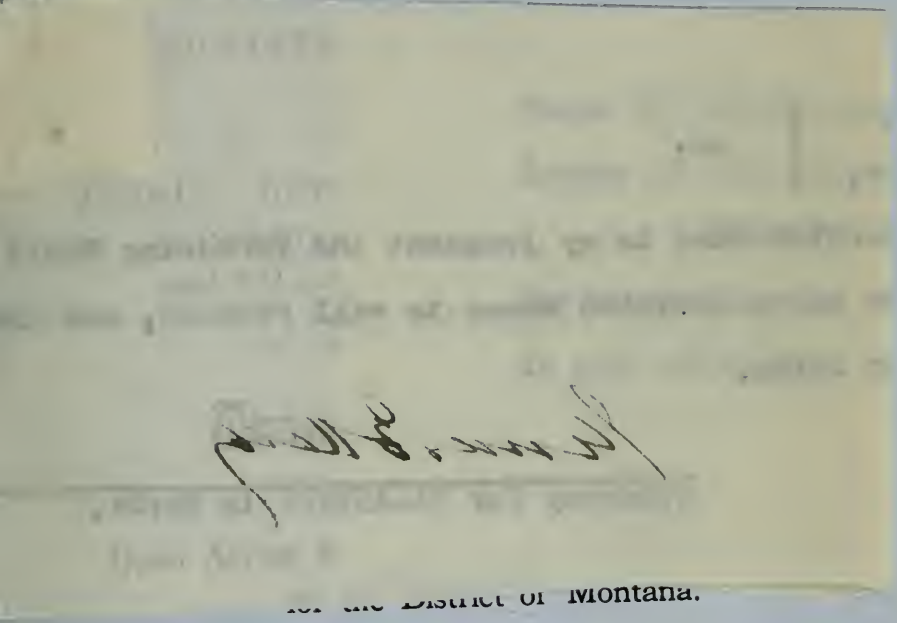
Attorneys for Plaintiff in Error.

No. 2414

United States

Circuit Court of Appeals

For the Ninth Circuit.



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Respectfully submitted,

A. S. Halsted,

J. E. Kelby,

Attorneys for Plaintiff in Error.

State of California,)
(ss.
County of Los Angeles,)

I hereby certify that in my judgment the foregoing Petition for Re-hearing in the above entitled cause is well founded, and that it is not interposed for delay.

Henry E. Kelly

Attorney for Plaintiff in Error.